***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

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# 74-1899

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-1899**

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

EDWARD TAYLOR HINMAN,

*Defendant-Appellant.*

## PETITION FOR REHEARING WITH SUGGESTION FOR EN BANC AND REQUEST FOR RECALL OF MANDATE


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## Preliminary Statement

The appellant, Edward Taylor Hinman, respectfully petitions for rehearing and suggests rehearing en banc of the order filed October 4, 1974 by a panel of this Court affirming the conviction of the appellant of conspiracy to possess and distribute heroin, in violation of 21 U.S. Code, Section 814(a). The conviction was affirmed from the bench and no decision was written.

## Reasons for the Petition

In affirming the appellant's conviction from the bench, it appears that the panel did not consider the important constitutional aspects of the right to confrontation raised in appellant's brief and argument.

Because no opinion was written it is nearly impossible to determine the basis for affirmance. However, a hint may be gleaned from a panelist's statement to counsel during argument that the hearsay statements of a co-conspirator linking appellant with the conspiracy were not offered for the truth thereof.

It is respectfully submitted that in light of all of the facts in this matter, reargument should be had or at least an opinion written on a matter of law which even the Government does not challenge as frivolous.

## Summary of Argument

Appellant contends that he was linked to the conspiracy by the testimony of a Government agent who testified as to statements made to him by an alleged co-conspirator. The co-conspirator never testified. This procedure was violative of appellant's right to confrontation. Appellant also agrues that without this hearsay testimony, there was not enough evidence to link him to the conspiracy and thus allow hearsay of this type. Also, even if there was enough

evidence to bring such testimony under the hearsay exception, such exception is violative of appellant's constitutional rights as enunciated in Dutton v. Evans, 400 U.S. 74 (1970).

## POINT I

### THE GOVERNMENT FAILED TO SUBMIT SUFFICIENT COMPETENT EVIDENCE TO SHOW A CONSPIRACY AND ENABLE ADMISSION OF THE HEARSAY STATEMENTS OF THE ALLEGED CO-CONSPIRATOR

In Glasser v. United States, 315 U.S. 60, 74-75 (1942), the Supreme Court established that hearsay declarations of a co-conspirator "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy."

This independent, non-hearsay evidence must show that a conspiracy actually existed and that the defendant participated in it. United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969).

Although hearsay declarations may now be admitted "subject to connection," it has been said that:

> . . . the judge must determine, when all the evidence is in whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances . . . if it has not, the judge

must instruct the jury to disregard the hearsay.

United States v. Geaney, supra, at 1120.

In the instant case, there is virtually no competent evidence to establish conspiratorial conduct on the part of the defendant Hinman. On the contrary, according to Agent Salvemini's testimony, Hinman never mentioned Seaman, nor did he indicate that the transaction would be completed by a third party, rather than by himself. In fact, negotiations never reached the point where Hinman was able to discuss any details with the agent concerning the sale. Instead, in their last conversation, Hinman stated that he was having difficulty making the necessary arrangements (p. 48). Finally, on cross-examination Agent Salvemini testified that all negotiations relating to the drugs he ultimately received were conducted by Seaman, not Hinman:

Q. After you started dealing with Mr. Seaman, did you ever have any contact with Mr. Hinman?

A. I never spoke to him again, sir, from the last time that I spoke to him on the phone.

Q. And all your dealings about price and delivery and quantity were with Mr. Seaman; is that correct?

A. For the package I received at the airport, Yes.

Q. Yes. Time, place, delays? You spoke to Mr. Seaman about that:

A. Yes, sir, that's correct.

Q. And when Mr. Seaman and Mr. Homen were arrested at LaGuardia Airport was Mr. Hinman there?

A. No sir, he was not. Not to my knowledge, anyway (pp. 100-101).

In short, the only evidence connecting the defendant with Seaman consists of those hearsay declarations of Seaman as to which Agent Salvemini testified.

The required conspiratorial agreement, therefore, cannot be established by non-hearsay evidence.

Although Agent Salvemini testified that the defendant gave him a sample of heroin, this act alone is not sufficient to support a conspiracy conviction. An overt act, such as this, is only one element of the crime which must be proved, in addition to an agreement between the parties and the necessary intent. As the court stated in Hall v. United States, 109 F.2d 976, 984 (10th Cir. 1940);

> An overt act alone is insufficient to constitute a conspiracy. There must be an unlawful agreement to which the overt act is referable.

In the present case there is no agreement between the defendant and Seaman to which Hinman's act can have reference.

It is therefore clear that the prosecution has failed to present sufficient, competent evidence to establish a conspiracy prima facie. Since defendant Hinman's conviction is thus not supported by the evidence it should be reversed.

## POINT II

### THE DECLARATIONS OF THE DEFENDANT'S ALLEGED CO-CONSPIRATOR SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE AS UNRELIABLE HEARSAY.

Under the traditional federal co-conspirator rule, hearsay declarations of a defendant's co-conspirator are admissible in evidence if they were made in the course of and in furtherance of the alleged conspiracy. Krulewitch v. United States, 336 U.S. 440 (1949).

The Supreme Court's decision in Dutton v. Evans, 400 U.S. 74 (1970), however, has cast considerable doubt upon the continuing validity of this rule, as potentially violative of the defendant's right to confrontation. As the Court noted, there may be a "violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception". 400 U.S. at 82. Therefore, although Dutton involved a Georgia state law, it is nevertheless relevant to federal conspiracy trials.

In Dutton, the Court held that, in order to satisfy constitutional requirements, a co-conspirator's extrajudicial statements must possess sufficient "indicia of reliability". 400 U.S. at 80.

The Second Circuit in United States v. Puco, 476 F.2d 1099, 1107 (1973), further explained that:

> For future applications of Dutton . . . we suggest that when a co-conspirator's out-of-court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances of the case, that statement bears sufficient indicia of reliability to assure the trier of fact an adequate basis for evaluating the truth of the declaration in the absence of cross-examination.

Although Dutton provided no guidelines for evaluating reliability, Puco noted that "in most cases the determination that a declaration is in furtherance of the conspiracy . . . will decide whether sufficient indicia of reliability were present." 476 F.2d at 1108 (emphasis added). This statement clearly indicates that not all hearsay declarations can be admitted solely on the basis of the traditional co-conspirator rule. One can conceive of numerous situations in which reliability, the new standard of admissibility, could not be assured merely by the fact that a statement was made in furtherance of an alleged conspiracy.

In the instant case, the only hearsay statement implicating the defendant is Salvemini's testimony that "he (Seaman) told me the package I would be receiving would be twice as good as the one he had sent me through Teddy (the defendant)" (p. 52).

According to Dutton and Puco, the admissibility of this declaration is to be determined solely on the basis of whether or not it is reliable.

The only possible indicia of reliability is that the statement was made in furtherance of an alleged conspiracy, which was itself never shown. To say that these circumstances establish reliability is to employ circular reasoning: that a statement was made in furtherance of a conspiracy assumes that there is a subsisting conspiracy. In the context of the co-conspirator rule, the law thus assumes the existence of a conspiracy in order to admit evidence to prove the existence of that same conspiracy. If a hearsay declaration were to be admissible solely on the basis of the established co-conspirator rule, reliability would thus be based on nothing more than an assumption. Moreover, the attempt of the Dutton Court to assure the defendant his right to confrontation would be circumvented.

To determine reliability, it is therefore clear that the court must consider all the circumstances of the case, not merely the possibility that, if a conspiracy existed, the declaration in question would further its purpose. The totality of circumstance here, however, indicates that Seamsn's declaration may be far from trustworthy. In fact, Seaman had a compelling reason to falsely associate himself with the defendant: in this way, he could rely on the quality of Hinman's sample as relayed by the informant without having to provide one of his own.

It was precisely this type of situation at which the Dutton ruling was directed. In that case, one of the grounds for a reliability finding was that the declarant "had no apparent motive to lie." 400 U.S. at 89. As such a "motive to lie" does exist in the present case, the trial court should have excluded the hearsay statement from evidence.

The Court in Dutton also held that reversal was not required because the evidence admitted was not crucial to the prosecution or devastating to the defense. 400 U.S. at 87.

In the present case, however, the hearsay declarations of Seaman supply the only link between him and the defendant. They thus constitute the only evidence supporting an essential element of the crime charged, namely an agreement between the alleged co-conspirators. Consequently, it is indisputable that this evidence was crucial to the Government's case, so that its admission constitutes reversible error.

## POINT III

### THE JUDGE'S INTERRUPTION OF THE DEFENDANT'S SUMMATION PREJUDICED THE DEFENDANT'S CASE

During the summation of the defense, the court interrupted with an instruction to the jury:

> Mr. Rosenthal: I can't cross-examine Mr. Seaman. He's not here. I can't ask him any questions. But even if he told that to the agent: I am with Teddy, how do we know that that is true? How do we know even if he said: I am with Teddy, I can get the stuff, I work with him. We don't have Mr. Seaman here. We can't look at him to find out if he's a truthful witness.
>
> Even if we accept the agent's word -
>
> The Court: I shall charge that Mr. Seaman is available to both sides and you can draw no adverse inferences on either side for failure to produce Mr. Seaman (pp. 117-118).

At this point, it appears that defense counsel was attempting to point out to the jury that the contents of Mr. Seaman's hearsay declarations need not be accepted as the truth and to indicate those circumstances which may cast doubt upon the credibility of these statements.

Although the Court's instructions may have been correct, interruption at this point could have misled the jury into believing that counsel's comments were incorrect and that the truthfulness of Mr. Seaman's statements could not be questioned.

This inference would necessarily be highly prejudicial to the defendant, in that Seaman's declarations constitute almost the only evidence against the defendant. The Court's interruption at this crucial point of the summation was therefore improper.

## CONCLUSION

For the reasons stated, it is respectfully requested that the Court grant rehearing and reverse the judgments of conviction. Alternatively, the Court should rehear this case en banc, and the mandate should be recalled.

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